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No. 07-460

FILED
JAN 14 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CHRISTINE WELLS GROFF
and MICHAEL WELLS,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The sweeping concessions in Respondent's Brief, and the invocation of an argument expressly rejected by Respondent in the United States Court of Appeals for the Federal Circuit, bring in to sharp relief the need for this Court to grant the Petition for a Writ of Certiorari.

Congress intended that the one-time death benefit under the Public Safety Officers' Benefits Act of 1976, 42 U.S.C. §§ 3796 *et seq.* ("PSOBA") compensate the families of law enforcement personnel and firefighters who die in the line of duty. Congress wished to pay a debt of gratitude. It was also designed to improve morale, aid recruitment and to provide recognition. (Petitioners' Appendix Page ("App. p.") 41a-51a.)

Petitioners are before this Court because the Bureau of Justice Assistance ("BJA") has imposed a per se exclusion to this remedial benefit, denying benefits arising out of the death of an aerial firefighter, such as Mr. Groff, Petitioners' husband and step-father. The national and state agencies operate their aerial firefighting wings through contracts with third parties. As the California Department of Forestry and Fire Protection ("CDF") attested in this case, this is merely a conduit for the paycheck: in all other respects, the aerial firefighters are under the direct control and supervision of the agencies, as the uncontested facts in this case show.

As the Respondent's Brief highlights, the BJA per se exclusion is inconsistent with the statutory mandate, frustrates the policy that Congress sought to implement, conflicts with Congress's express intent, and is arbitrary.

1. Respondent admits all the facts exhibiting the pervasive control and substantial supervision by the CDF over the day-to-day activities of Mr. Groff, the aerial firefighter killed while fighting a fire as part of CDF. This level of control establishes that Mr. Groff was serving in an official capacity, recognized and designated as part of the CDF.

2. Respondent now raises the 2006 Revisions to the Regulations at 28 C.F.R. § 32.3 (2006) relating to the PSOBA. Respondent did not raise the 2006 Revisions in its briefing below, and, as the United States Court of Appeals for the Federal Circuit noted, Respondent expressly declined to rely on these revisions at oral argument (App. p. 22a-22b.) Petitioners believe that Petitioners' claim should be granted even if the Court considers the 2006 Revisions.

3. Respondent concedes that the United States Court of Appeals for the Federal Circuit impermissibly changed the expression of Congress's legislative intent (that Congress wanted to ensure that "professional firefighters" were covered by the PSOBA) by misquoting its prior decision in *Amber-Messick v. United States*, 483 F.3d 1316 (Fed. Cir. 2007). In *Amber-Messick*, the Federal Circuit Court of Appeals determined that Congress wanted to **ensure** that

"professional firefighters" were included within the coverage of PSOBA citing H.R. Rep. No. 94-1031, at 4 (1976) ("The bill defines 'firemen' to include volunteer as well as professional firemen."). *Amber-Messick*, 483 F.3d at 1324. In its decision in this case to exclude PSOBA coverage, the Federal Circuit Court of Appeals changed the statement of Congressional intent: "As we observed in *Amber-Messick*, the drafters of the PSOBA were concerned with ensuring that both volunteer and public employee firefighters were included with the scope of the Act." (App. p. 18a.) This change to "public employee" from "professional firefighter" is contrary to the Congressional record, which as originally quoted in *Amber-Messick* was to ensure that "professional firefighters", not just "public employee firefighters" were included within the scope of the PSOBA. The Congressional intent cited in *Amber-Messick* supports the award of the PSOBA benefit to Petitioners.

A. The Aerial Firefighters Serve In An Official Capacity

Contrary to Respondent's assertion, Petitioners are not before this Court to dispute facts. There is no dispute of facts, as Respondent's Brief makes clear. What is at issue is Respondent's refusal to acknowledge that the overwhelming and uncontested facts demonstrate that Mr. Groff was serving the CDF (a public agency) in an official capacity at the time he died in the line of duty. This is so whether under the

plain language of the PSOBA, 42 U.S.C. § 3796(a), or under the so-called *Holstine* test:

> In order to be serving a public agency in an official capacity one must be an officer, employee, volunteer, or similar relationship of performing services as a part of a public agency. To have such a relationship with a public agency, an individual must be officially recognized or designated as functionally within or a part of the public agency.

Petitioners are not disputing facts. Petitioners set forth extensive uncontested facts that establish the relationship necessary in order that they, the survivors of a firefighter killed in the line of duty while serving a public agency in an official capacity, are entitled to the one-time death benefit under the PSOBA. Yes: the establishment of the relationship is factual. This is in accordance with a fundamental principle of our legal system: *ex facto jus oritur* (the law springs or ought to spring from the facts). *See*, *Adams v. Tanner*, 244 U.S. 590, 600, 37 S. Ct. 662, 61 L. Ed. 1336 (1917) (Brandeis, J., dissenting) ("*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law"); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984).

The facts demonstrate that Mr. Groff was fully integrated into the firefighting services of the CDF as a firefighter. Respondent does not dispute these facts, and is mandated to give them substantial weight as the BJA reviews a PSOBA claim. 28 C.F.R. § 32.5

(2001). *Demutiis v. United States*, 291 F.3d 1373, 1379 (Fed. Cir. 2002).

- At the time of his death, Mr. Groff was the pilot of an airtanker delivering fire retardant as part of a CDF fire fighting operation.
- Both airtankers in the collision were owned by the CDF and were operated under the control and direction of the CDF for public use fire suppression and were being operated solely for the purposes of state business.
- During firefighting operations, contract pilots such as Mr. Groff were supervised by a CDF air tactical group supervisor who would "ordinarily fly in an orbit above the level of the airtankers and . . . describe targets to the airtanker and helicopter pilots."
- The CDF dispatched the planes flown by pilots such as Mr. Groff. The CDF designates at which CDF air attack bases the pilots are based, and the pilots fly the planes as ordered by the CDF.
- Contract CDF pilots wear CDF uniforms as specified by the CDF.
- Contractor pilots were required to participate in CDF debriefings (critiques of missions) and were evaluated by CDF personnel.
- Contract CDF pilots had CDF credit cards for refueling CDF planes.
- Contract CDF pilots were interagency carded, which meant that the pilots were authorized

to operate a State airtanker and to participate in mutual aid responses to federal agency fires.

- Contract CDF pilots have the authority as a State firefighter pilot to close airspace to civil aircraft, to get priority handling from the FAA on airspace use, and to give orders as necessary to suppress wildland fires, as a state firefighter.
- On the day of his death, Mr. Groff was performing services under the supervision of a CDF air tactical group supervisor, a battalion chief, flying above his airtanker.
- The CDF attested that the "employer [under the state contract] was merely a conduit to provide pay to our [CDF] pilot."
- The CDF also sets pilot standards, must approve the hiring of each pilot, train the pilots, check ride and finally card the pilots for State duty. The sole function of the contractor was/is to provide a means of paying the pilots and maintenance technicians.
- The National Transportation Safety Board found that the CDF was operating the CDF airtanker for "public-use fire suppression flights."
- The CDF attested that in its opinion Mr. Groff was "serving as an officially recognized and designated member of the CDF."
- The State of California submitted the PSOB death benefit application relating to Mr.

> Groff's death because Mr. Groff was the Pilot-in-Command of a State Airtanker responding to a State wildland fire.

Respondent does not contest that the airtankers and their pilots are an integral part of firefighting capabilities and operations, especially in the ever-increasing wildland-urban interface ("WUI"). These areas are increasingly susceptible to large fires, as the WUI grows exponentially (this is where most development is built). Respondent does not contest that climate conditions such as global warming are producing long fire seasons, and, according to the Federal Bureau of Investigation, there is a real threat of domestic terrorism through large scale arson.

As pending Amici Curiae Associated Airtanker Pilots and Aerial Firefighters and California Department of Forestry and Fire Protection describe in their proposed brief submitted to this Court:

> The pilots working for the public agencies under contract through the third party providers serve these agencies in an official capacity. The differences between a CDF helicopter pilot and an airtanker pilot is the piece of equipment and where the paycheck comes from. Both fly under CDF rules and are directed by CDF personnel. For instance, a CDF contract air tanker pilot completes the same pilot application form as a CDF helicopter pilot. The Interagency Card is also the same. This Interagency Card gives the holder the right to fly a plane, or helicopter as the case may be, for the CDF or USFS,

and also allows the pilot to operate as a firefighter and take control of fire scenes. It also gives the pilot the responsibility of initial attack on a fire, and is entrusted with the public safety to act as initial attack. The Interagency Card holder can close down airspace and state and federal highways if they see these actions as necessary. The Interagency Card is issued by the agency, CDF or USFS, not the contractor. The Interagency Card entitles the pilot to operate on fires on private and public lands, whether federal or state, and under the interagency agreements. The holder operates as and is a State fire officer, and acts as a pilot-in-command of a fire scene. In the recent Presidential visit to Southern California during the fires, the Interagency Card holder firefighters were the only aircraft permitted to fly in the temporary no fly area created for the President.

The pilots perform an official function, flying a public aircraft as part of the public firefighting force to put out a fire threatening state owned property, people's lives and private homes. In the case of CDF pilots, they are stationed at CDF air attack bases, fly CDF planes as ordered by CDF controllers. They drop fire retardant under CDF direction while fighting a fire as part of the overall CDF incident response effort where their actions are integrated with all other CDF units on the ground and in the air. They have the authority as a State firefighter pilot under the Federal Aviation Regulations to close airspace to civil aircraft, to get priority

> handling from the FAA on airspace use, and to give orders as necessary to suppress wildland fires. Except for the way they are provided their paycheck, there is no difference between them and a direct CDF employee.

The uncontested facts manifest that Mr. Groff was in a similar relationship of performing services as a part of a public agency as that of an employee and was "officially recognized or designated as functionally within or a part of the public agency."

B. The Per Se Exclusion Is Arbitrary and Contrary To The Policy Of The Statute

Instead of looking at the true relationship as established by the uncontested facts, Respondent relies on the contract between the CDF and the third party contracting entity. (It is significant that the same pilots fly for the governmental entity no matter which third party is the current holder of the contract.) This is the basis for the Per Se Exclusion of the aerial firefighters: If there is a contract with a third party, there is no coverage for the aerial firefighters. Respondent claims that this per se exclusion, based on this faulty and myopic analysis is entitled to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) ("*Chevron*").

Respondent puts form over substance and ignores its own stated standard. Focusing on the existence and form of the contract between the state agency

and the "employer" begs the question. a. The statute is broader than employment. b. The facts demonstrate a pervasive relationship between Mr. Groff and CDF, akin to that of direct employment. [App. P. 64a-65a; 70a-71a]; *LaBare v. United States* (2006) 72 Fed. Cl. 111, 124 (Ct. Cl. 2006) "pervasive relationship between the State and Mr. Groff.")

The adhesion to the existence of a contract with a third party provider is the sole root of the Per Se Exclusion by the BJA of the so-called contract aerial firefighters from the scope of the PSOBA. Its genesis was fully discussed in Petitioners' Opening Brief. [Opening Brief, pp. 16-21.]: This per se exclusion is arbitrary and capricious. It is unlike any test, state or federal, relating to the determination of a relationship such as employment status. For instance, whether under state employment law, or federal employment law, the provisions of a contract alone do not govern. The true nature of the relationship is what controls, of which the contract is only a part of the analysis. For instance, under California state employment law, the most important factor is the principal's right to control, and actual control of the manner and means of accomplishing a desired result, and this test should be applied with deference to the protective legislation. *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal. 3d 341, 353, 256 Cal. Rptr. 54, 769 P.2d 399 (Cal. 1989). The federal standard is similar: the right to control the manner and means. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323, 112 S. Ct. 1344, 117 L. Ed. 2d 581

(1992). Whatever the test employed, it is not solely determined by the contract at hand.[1]

Petitioner basically maintains that because the BJA has repeated its per se exclusion over and over again, it is entitled to *Chevron* deference. Multiple wrongs do not make a right, nor are they entitled to *Chevron* deference. (*See*, Petitioners' Opening Brief, pp. 23-27.) This policy cannot be allowed to continue. It arbitrarily excludes a significant part of the national firefighting force from being awarded the support, gratitude and recognition intended by Congress. The

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[1] Even if the 2006 Revisions, C.F.R. § 32.3 (2006), are considered by this Court, despite Respondent's prior express rejection of reliance on them, Petitioners maintain that their claim would be granted in light of the facts established.

The 2006 Revisions, at C.F.R. § 32.3, define "Official Capacity" as

> An individual serves a public agency in an official capacity only if –
>
> (1) He is officially authorized, recognized or designated (by such agency) as functionally within or part of it; and
>
> (2) His acts and omissions, while so serving, are legally those of such agency, which legally recognizes them as such (or at a minimum, does not deny (or has not denied) them to be such.)

The uncontested facts are replete with the recognition by the CDF that it recognized Mr. Groff as functionally part of the CDF and Mr. Groff's actions as its own, and that it does not deny them. Under the totality of the facts, including the contract, it is clear that the relationship between CDF and Mr. Groff was one in which he was serving in an official capacity, and CDF recognized his actions as those of the CDF.

per se exclusion contradicts the very purposes of the PSOBA:

- To assist in the recruitment and retention of qualified public safety officers.
- To establish the value that communities place on contributions from those who are willing to serve their communities during potentially dangerous circumstances.
- To offer peace of mind to men and women who are seeking careers in public safety.

This is a national issue, and the aerial firefighters are part of the national fire response. National Interagency Fire Center, *Interagency Standards for Fire and Aviation Operations* ("*Interagency Standards*"), Chapter 17, Aviation Operations/Resources, Purpose and Scope, page 17-1. *See*, Testimony of James B. Hull, President, National Association of State Foresters Before the Senate Committee on Energy and National Resources Subcommittee on Public Lands and Forests, February 15, 2006. As a matter of national policy, air tankers are a national resource. *Interagency Standards*, Chapter 17, Aviation Operations/Resources, Airtankers, page 17-9. This is even though they are obtained through contract. 2007 National Airtanker Service Contract, C.1.1(c), Objectives, page 7: "Airtankers awarded under this contract are considered national resources." This is not the time to damage further the morale and recruiting efforts of this critical arm of national firefighting efforts.

The BJA policy is capricious. For instance, if a CDF airtanker collided with a CDF helicopter during a fire suppression operation, killing the pilots of both aircraft, the airtanker pilot's family would be denied benefits while the helicopter pilot's family would be granted benefits: the helicopter pilots are employed directly by CDF while the airtanker pilots are employed through the contract. Both are in aircraft owned by the same agency, wearing the same uniforms, under common control, both recognized as and with the authority of state firefighters. The BJA's policy is arbitrary, unreasonable and contrary to the policy expressed in the statute.

In sum, removing the BJA's per se exclusion would enhance the purposes of PSOBA. It would aid recruitment, enhance morale and provide some security for the families. *Davis v. United States*, 50 Fed. Cl. 192, 208 (Ct. Cl. 2001.)

CONCLUSION

A Writ of Certiorari should be granted to address this significant legal and public issue.

Dated: January 14, 2008.

Respectfully submitted,

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